

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Katrin COUNRADI et al.

**Confirmation No. 4896**

Group Art Unit: 1796

Appl. No. : 10/573,323

Examiner: Mruk, Brian P

I. A. Filed : September 23, 2004

For : FOAMING PREPARATION WITH A YIELD POINT

**APPEAL BRIEF UNDER 37 C.F.R. § 41.37**

Commissioner for Patents  
U.S. Patent and Trademark Office  
Customer Service Window, Mail Stop Appeal Brief - Patents  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Sir:

This Appeal is from the Examiner's rejection of claims 41-71 set forth in the Final Office Action mailed from the U.S. Patent and Trademark Office on June 17, 2009.

A Notice of Appeal in response to the June 17, 2009 Final Office Action was filed on December 16, 2009. A request for a one-month extension of time is being filed concurrently herewith.

The requisite fee under 37 C.F.R. § 41.20(b)(2) for filing this Appeal Brief and the fee for a one-month extension of time are being paid concurrently herewith. The Patent and Trademark Office is hereby authorized to charge any additional fees that may be deemed necessary for maintaining the pendency of this application, including any appeal or extension of time fees that may be deemed necessary, to Deposit Account No. 19-0089.

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## **I. REAL PARTY IN INTEREST**

The real party in interest in this appeal is Beiersdorf AG of Hamburg, Germany. The corresponding assignment was recorded in the U.S. Patent and Trademark Office on May 25, 2005 at REEL 017676, FRAME 0233.

## **II. RELATED APPEALS AND INTERFERENCES**

Appellants, Appellants' representative or the Assignee are not aware of any prior and pending appeals, interferences or judicial proceedings which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

## **III. STATUS OF CLAIMS**

The status of the claims is as follows:

Claims 41-71 are pending in this application.

Claims 1-40 are cancelled.

Each of claims 41-71 is indicated as rejected in the Final Office Action mailed June 17, 2009.

The rejection of each of claims 41-71 is under appeal. Claims 41-71 involved in the appeal are reproduced in the Claims Appendix attached hereto.

#### IV. STATUS OF AMENDMENTS

No Amendment has been filed subsequent to the Final Office Action mailed June 17, 2009.

#### V. SUMMARY OF CLAIMED SUBJECT MATTER

##### A. Claim 41

Independent claim 41 is drawn to a cosmetic or dermatological cleansing preparation. The preparation comprises

- (a) at least one disodium acyl glutamate as an anionic surfactant,
- (b) optionally, one or more further surfactants,
- (c) one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swellaable acrylate copolymers,
- (d) optionally, up to 20 % by weight, based on the total weight of the preparation, of ethoxylated mono-, di-, and triglycerides of carboxylic acids having from 8 to 22 carbon atoms, and
- (e) optionally, suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets.

The total concentration of (a) plus (b) is from 10 % to 20 % by weight, relative to the total weight of the preparation.

See, e.g., page 6, line 5 from bottom to page 7, line 11; page 12, lines 6-7 from bottom; and page 21, lines 3-16 of the present specification.

**B. Claim 53**

Independent claim 53 is drawn to a cosmetic or dermatological cleansing preparation which comprises

- (a) at least one anionic surfactant,
- (b) optionally, one or more further surfactants,
- (c) one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swelling acrylate copolymers,
- (d) from 1 % to 20 % by weight, based on the total weight of the preparation, of ethoxylated mono-, di-, and triglycerides of carboxylic acids having from 8 to 22 carbon atoms, and
- (e) optionally, suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets.

The total concentration of (a) plus (b) is from 10 % to 20 % by weight, relative to the total weight of the preparation.

See, e.g., page 6, line 5 from bottom to page 7, line 11; page 12, lines 6-7 from bottom; and page 21, lines 3-16 of the present specification.

**C. Claim 65**

Independent claim 65 is drawn to a cosmetic or dermatological cleansing preparation which comprises

- (a) at least one anionic surfactant,
- (b) optionally, one or more further surfactants,

(c) one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swellaable acrylate copolymers,

(d) optionally, up to 20 % by weight, based on a total weight of the preparation, of ethoxylated mono-, di-, and triglycerides of carboxylic acids having from 8 to 22 carbon atoms, and

(e) optionally, suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets.

Components (a) and (b) comprise one or more surfactants selected from disodium acyl glutamates, lauryl ether sulfates, alkyl amidopropylbetaines and alkyl polyglucosides. The total concentration of (a) plus (b) is from 10 % to 20 % by weight, relative to the total weight of the preparation. The preparation further has a yield point of from 0.5 to 20 Pa, a  $\tan \delta$  of from 0.05 to 0.6, and a pH of  $>5.5$ .

See, e.g., page 6, line 5 from bottom to page 7, line 11; page 12, lines 6-7 from bottom and 1-2 from bottom; page 13, lines 16-17 from bottom and 1-2 from bottom; page 14, lines 10-11 from bottom; and page 21, lines 3-16 of the present specification.

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

The broad issue under consideration is:

Whether claims 41-71 are properly rejected under 35 U.S.C. § 102(b) as allegedly anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as allegedly obvious over Dubowoj, DE 19937813 (hereafter "DUBOWOJ").

## VII. ARGUMENTS

### A. Citation of Authority

#### 1. Anticipation

Anticipation under 35 U.S.C. § 102 requires the disclosure in a single piece of prior art to show each and every limitation of a claimed invention. *Celeritas Technologies, Ltd. v. Rockwell International Corporation*, 150 F.3d 1354, 1360, 47 USPQ 2d 1516, 1522 (Fed. Cir. 1998); *Oakley, Inc. v. Sunglass Hut International*, 65 USPQ2d 1321, 1325 (Fed. Cir. 2003); *Applied Medical Resources Corporation v. United States Surgical Corporation*, 147 F.3d 1374, 1377, 47 USPQ2d 1289, 1291 (Fed. Cir. 1998); *Rockwell International Corporation v. The United States, et al.*, 147 F.3d 1358, 47 USPQ2d 1027, 1029 (Fed. Cir. 1998).

An "anticipating" reference must describe all of the elements and limitations of the claim as arranged in the claim in a single reference, and enable one of skill in the field of the invention to make and use the claimed invention. *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1378-79 (Fed. Cir. 2001); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226 (Fed. Cir. 1989); *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.* 347 F.3d 1367 (Fed. Cir. 2003); *NetMoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359 (Fed. Cir. 2008).

A prior art reference anticipates a patent claim if the reference discloses, either expressly or inherently, all of the limitations of the claim. *EMI Group N. Am., Inc. v. Cypress Semiconductor Corp.*, 268 F.3d 1342, 1350 (Fed. Cir. 2001); *Schering Corp. v. Geneva Pharm.*, 339 F.3d 1373, 1379 (Fed. Cir. 2003).

In order to be anticipating, a prior art reference must be enabling so that the claimed subject matter may be made or used by one skilled in the art. *Amgen Inc. v. Hoechst Marion Roussel, Inc.* 314 F.3d 1313, 1354 (Fed. Cir. 2003).

If a reference does not expressly set forth a particular element of a claim, that reference may still anticipate the claim if the element is "inherent" from the reference. Matter is "inherent" if the extrinsic evidence makes it clear that the matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. *Titanium Metals Corp. v. Banner*, 778 F.2d 775 (Fed. Cir. 1985); *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349-50 (Fed. Cir. 2002); *In re Crish*, 393 F.3d 1253, 1258-59 (Fed. Cir. 2004). Inherency, however, cannot arise from probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. To the contrary, a certain thing must result from a given set of circumstances to be inherent. *In re Robertson*, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).

## **2. Obviousness**

The appropriate starting point for a determination of obviousness is stated in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 U.S.P.Q. 459, 466 (1966):

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.

The test of obviousness *vel non* is statutory and requires a comparison of the claimed subject matter as a whole with the prior art to which the subject matter pertains.



*In re Brouwer*, 77 F.3d, 422, 37 U.S.P.Q. 2d 1663 (Fed. Cir. 1996); *In re Ochiai*, 71 F.3d 1565, 37 U.S.P.Q. 2d 1127 (Fed. Cir. 1995).

Often, it will be necessary to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. This analysis should be made explicit. There must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1740-1741. “A patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *Id.*, at 1741.

“If the Examiner fails to establish a *prima facie* case, the rejection is improper and will be overturned.” *In re Rijckaert*, 9 F.3d, 1532, 28 U.S.P.Q.2d, 1956 (Fed. Cir. 1993), citing *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988).

**B. Claims 41-71 Are Not Properly Rejected Under 35 U.S.C. 102(b)/ 35 U.S.C. 103(a) As Being Anticipated By Or Obvious Over DUBOWOJ**

**1. Summary of Rejection**

The rejection alleges that DUBOWOJ discloses an aqueous hair washing composition that is gel-forming and transparent and contains 2-50% by weight of surfactants, 0.25-10% by weight of an acrylate terpolymer and adjunct ingredients, such as visible particles. The rejection relies specifically on Example 1 of DUBOWOJ which sets forth a composition that comprises several surfactants and has a pH of 6.0. The rejection concedes that DUBOWOJ is silent with respect to transmission value, yield point and tan delta of their composition but asserts that the compositions of DUBOWOJ would inherently have the corresponding properties. The Examiner further takes the position that if the disclosure of DUBOWOJ is insufficient to anticipate the rejected claims, it would have been obvious to one of ordinary skill in the art to produce the claimed composition, as DUBOWOJ allegedly teaches each of the claimed ingredients within the claimed proportions for the same utility.

**2. DUBOWOJ does not anticipate the claimed subject matter**

**a. Independent claims**

Appellants point out that all of the present independent claims 41, 53 and 65 recite, *inter alia*, that the claimed cosmetic or dermatological cleansing preparation comprises component (c), i.e., one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swelling acrylate copolymers. For example, dependent claim 45 recites that component (c) comprises a copolymer of (i) one or more acrylate monomers, (ii) one or more  $\alpha,\beta$ -ethylenically unsaturated monomers and (iii) one or more

polyunsaturated monomers suitable for partial cross-linking. See also paragraphs [0024]-[0026] of the present specification.

Appellants submit that DUBOWOJ fails to disclose the use of a gel-forming cross-linked, alkali-swellable acrylate copolymer in the shampoo concentrate compositions disclosed therein. In particular, the only acrylate copolymer which is present in the shampoo concentrate compositions of DUBOWOJ appears to be a lower alkylacrylate/di(m)ethylaminoethyl (meth)acrylate/alkylpolyethylene glycol itaconate terpolymer (see, e.g., abstract of DUBOWOJ).

For example, the corresponding terpolymers which are employed in the compositions which are set forth in the Examples of DUBOWOJ are an ethylacrylate/diethylaminoethylmethacrylate/C<sub>10-20</sub>-alkyl-PEG-20 itaconate terpolymer (Example 1), an ethylacrylate/diethylaminoethylmethacrylate/lauryl-PEG-15 itaconate terpolymer (Example 2), an ethylacrylate/diethylaminoethylmethacrylate/C<sub>12-14</sub>-alkyl-PEG-15 itaconate terpolymer (Example 3), an ethylacrylate/-diethylaminoethylmethacrylate/C<sub>10-18</sub>-alkyl-PEG-20 itaconate terpolymer (Example 4), and an ethylacrylate/diethylaminoethylmethacrylate/C<sub>12-14</sub>-alkyl-PEG-20 itaconate terpolymer (Example 5).

It is not seen that any of these terpolymers is cross-linked and/or alkali-swellable. Regarding the cross-linking, it is not seen that these terpolymers contain a monomer which can give rise to cross-linking, such as, e.g., a polyunsaturated monomer, and neither does the Examiner provide any explanation in this regard.

Regarding the alkali-swellability, it is noted that the terpolymers of DUBOWOJ are used in exemplified compositions which have a pH of as low as 5.5, i.e., in the acidic

range, which fact alone is an indication that these terpolymers are not alkali-swellaable (otherwise they would probably be employed at a higher pH).

It furthermore is not even known whether the terpolymers of DUBOWOJ can form gels (i.e., act as thickener) by themselves at all. For example, the paragraph after the composition of Example 1 at page 6, lines 26-31 of DUBOWOJ states:

This shampoo concentrate was compared to a shampoo concentrate which did not contain a terpolymer.

The shampoo concentrate according to the present invention showed a significantly better foaming behavior with respect to foam volume, "creaminess" of the foam and uniformity of the foam.

In a half-side double blind experiment with 10 subjects a significantly improved wet and dry combability, a soft feel and volume as well as increased gloss were observed.

The shampoo concentrate exhibited a stable viscosity during storage for three months at 40°C.

The above passage appears to indicate that (in contrast to the foaming behavior) the viscosity of the shampoo concentrate composition is not (significantly) affected by the absence of the terpolymer.

Appellants further note that regarding the compositions disclosed in DUBOWOJ, i.e., compositions which comprise a mixture of (a) 2.5 to 50 % by weight of at least one polyethyleneglycol-(3-10)-C<sub>8</sub>-C<sub>18</sub>- alkylcitrate sulfosuccinate and/or water-soluble salts thereof and (b) 0.25 to 10% by weight of a C<sub>1</sub>-C<sub>4</sub> alkylacrylate/dimethyl- or diethylaminoethyl (meth)acrylate/C<sub>10</sub>-C<sub>30</sub> alkyl-polyethyleneglycol-10-30 itaconate terpolymer, DUBOWOJ states at page 2, lines 22-27 (emphasis added):

A further advantage of these compositions is the self-thickening effectiveness of these mixtures, i.e., it is not necessary to add additional inorganic or organic thickeners to achieve the viscosity range of about 1,000 to 60,000 mPa.s at 25°C, measured with a Brookfield viscosimeter, which is particularly preferred for shampoo concentrates.

The presence of such thickeners can cause stability problems because they can interfere with the other components. This is not the case with the shampoo concentrates based on the compositions according to the present invention.

The above passage does not attribute any self-thickening properties to the terpolymer as such, but only to the mixture of components (a) and (b). This is in conformity with paragraph [0042] of the present specification where terpolymers of the type taught by DUBOWOJ are mentioned as examples of anionic surfactants, i.e., not as thickeners or gel-formers.

It further is pointed out that at page 3, lines 23-29 thereof, DUBOWOJ states:

The second essential component of the shampoo concentrate according to the present invention is a terpolymer of a C<sub>1</sub>-C<sub>4</sub> alkylacrylate, preferably ethylacrylate, dimethyl- or diethylaminoethylacrylate or methacrylate and a C<sub>10</sub>-C<sub>30</sub> alkyl-polyethyleneglycol-10-30-itaconate.

The preparation of these polymers and their use in cosmetic compositions is known per se. It was, however, surprising and not foreseeable that they have a stabilizing, foam improving and skin irritation counteracting effect as well as additional conditioning activity in the special detergent mixtures according to the invention.

Also the above passage is devoid of any indication whatsoever that the terpolymers employed according to DUBOWOJ have a thickening effect.

Appellants note that in response to the above arguments the Examiner states in the Advisory Action mailed August 27, 2009 (see Continuation Sheet):

... Specifically, the examiner asserts that Example 1 of Dubowoj clearly discloses a composition that contains an Ethylacrylate/Diethylaminoethylmethacrylate/C10-20-alkyl/PEG-20 itaconate-Terpolymer. Furthermore the Examiner asserts that Page 8, Paragraph 42 of the instant specification indicates that suitable gel-forming acrylate copolymer thickeners that are cross-linked and alkali swellable include Acrylate/Aminoacrylate/C10-30 alkyl/PEG-20 itaconate copolymers. Accordingly, although Dubowoj is silent with respect to the properties of their acrylate copolymers, the examiner asserts that the Ethylacrylate/-Diethylaminoethylmethacrylate/C10-20-alkyl/PEG-20 itaconate-Terpolymer disclosed in Example 1 of Dubowoj would inherently be alkali-swellable and

crosslinked, since applicant's own specification indicates that these copolymers are preferred acrylate copolymers used in the instant invention. Furthermore, the examiner asserts that the Terpolymer disclosed by Dubowoj in Example 1 contains all of the required monomer units required by applicant in the instant invention. ...

It is submitted that the Examiner clearly has misconstrued the present specification in this regard. In particular, paragraph [0042] is a part of the passage from paragraph [0037] to paragraph [0042] of the present specification which discusses substances which are suitable as component (a) of the claimed preparations, i.e., as anionic surfactants. This becomes clear, *inter alia*, from the first sentence of paragraph [0042] of the present specification which refers to compounds which are "further advantageous" (i.e., in addition to the anionic surfactants set forth in the preceding paragraphs) and from the fact that paragraph [0043] for the first time mentions "[a]n advantageous acrylate thickener to be used according to the invention", i.e., a commercial product with the designation Aqua SF-1, which product is used as the acrylate thickener component (c) in all of the 27 preparations which are exemplified at pages 17-20 of the present specification.

Appellants submit that for at least all of the foregoing reasons, DUBOWOJ is unable to anticipate the subject matter of any of claims 41, 53 and 65 and the claims dependent therefrom.

#### **b. Dependent claims**

Appellants submit that even if one were to assume, *arguendo*, that the shampoo concentrate of Example 1 of DUBOWOJ anticipates the subject matter of independent claims 41, 53 and 65 because the terpolymer used in Example 1 thereof is considered to

be a gel-forming cross-linked, alkali-swellaable acrylate copolymer, it is not seen that any of the following claims is anticipated by Example 1 of DUBOWOJ:

Claim 45 recites that the gel-forming cross-linked, alkali-swellaable acrylate copolymer used as component (c) in the preparation of claim 41 comprises a copolymer of (i) one or more acrylate monomers, (ii) one or more  $\alpha,\beta$ -ethylenically unsaturated monomers and (iii) one or more polyunsaturated monomers suitable for partial cross-linking. Appellants are unable to see that the terpolymer used in Example 1 of DUBOWOJ comprises any polyunsaturated monomer, and neither does the Examiner offer any explanation in this regard.

Claim 50 recites that the preparation of claim 41 comprises from 0.1 % to 20 % by weight of one or more ethoxylated mono-, di-, and triglycerides of fatty acids having an average degree of ethoxylation of from 3 to 20 ethylene oxide units.

According to claim 51 the preparation comprises from 1 to 4 % by weight of these one or more ethoxylated mono-, di-, and triglycerides of fatty acids. It is not seen that the shampoo concentrate of Example 1 of DUBOWOJ comprises any ethoxylated mono-, di-, and triglycerides of fatty acids having an average degree of ethoxylation of from 3 to 20 ethylene oxide units, let alone in the percentages recited in claims 50 and 51.

Claim 57 recites that the preparation of claim 53 comprises a gel which has embedded therein at least one of gaseous, solid or liquid objects. It is not seen that the shampoo concentrate of Example 1 of DUBOWOJ comprises any gaseous, solid or liquid objects, let alone objects which are embedded in a gel.

Claim 58 recites that the preparation of claim 53 comprises not more than 0.5 % by weight of cationic polymers. The shampoo concentrate of Example 1 of DUBOWOJ

contains an undisclosed amount (due to a typographical error) of a cationic polymer, i.e., Polyquaternium-7 (a copolymer of acrylamide and diallyldimethyl ammonium chloride). The fact that the amount of cationic polymer in the shampoo concentrate of Example 1 of DUBOWOJ is not known clearly does not mean the concentration of cationic polymer in the concentrate is necessarily not higher than 0.5 % by weight. For example, the shampoo concentrate of Example 2 of DUBOWOJ contains 1.0 % by weight of Polyquaternium 7, which indicates that concentrations of cationic polymer which are significantly higher than 0.5 % can be used in the compositions of DUBOWOJ.

Claim 59 recites that the preparation of claim 53 is free of cationic polymers. The shampoo concentrate of Example 1 of DUBOWOJ contains an undisclosed amount (due to a typographical error) of a cationic polymer, i.e., Polyquaternium-7, and thus clearly fails to anticipate claim 59 for this reason alone.

Claim 62 recites that the preparation of claim 53 has a transmission value of >70 %. Appellants note that the Examiner has failed to explain why the shampoo concentrate of Example 1 of DUBOWOJ necessarily has a transmission value of >70 %.

Claim 63 recites that the preparation of claim 53 has at least one of a yield point of from 1 to 6 Pa and a  $\tan \delta$  of from 0.1 to 0.5. The Examiner has failed to explain why the shampoo concentrate of Example 1 of DUBOWOJ necessarily has a yield point of from 1 to 6 Pa and/or a  $\tan \delta$  of from 0.1 to 0.5.

Claim 64 recites that the preparation of claim 53 has a pH of from 6.3 to 6.9. It is pointed out that DUBOWOJ expressly states that the shampoo concentrate of Example 1 thereof has a pH of 6.0. For this reason alone, Example 1 of DUBOWOJ fails to anticipate claim 64.



(Independent) claim 65 recites, *inter alia*, that the preparation has a yield point of from 0.5 to 20 Pa and a  $\tan \delta$  of from 0.05 to 0.6. The Examiner has failed to explain why the shampoo concentrate of Example 1 of DUBOWOJ necessarily has a yield point of from 0.5 to 20 Pa and a  $\tan \delta$  of from 0.05 to 0.6.

Claim 66 recites that the preparation of claim 65 has a transmission value of >70 %. The Examiner has failed to explain why the shampoo concentrate of Example 1 of DUBOWOJ necessarily has a transmission value of >70 % (in addition to the yield point and  $\tan \delta$  recited in claim 65).

Claim 67 recites that the preparation of claim 66 has at least one of a yield point of from 1 to 6 Pa a  $\tan \delta$  of from 0.1 to 0.5 and a pH of >6.0. Appellants point out that DUBOWOJ expressly states that the shampoo concentrate of Example 1 thereof has a pH of 6.0 and for this reason alone, claim 67 is not anticipated by Example 1 of DUBOWOJ.

Claim 70 recites that the preparation of claim 65 comprises suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets. It is not seen that the shampoo concentrate of Example 1 of DUBOWOJ comprises any suspended objects and for this reason alone, claim 70 is not anticipated by Example 1 of DUBOWOJ.

Claim 71 recites that the preparation of claim 65 is free of cationic polymers. The shampoo concentrate of Example 1 of DUBOWOJ contains an undisclosed amount (due to a typographical error) of a cationic polymer, i.e., Polyquaternium-7 (a copolymer of acrylamide and diallyldimethyl ammonium chloride). For this reason alone, Example 1 of DUBOWOJ fails to anticipate claim 71.

### 3. DUBOWOJ does not render obvious the claimed subject matter

#### a. Independent claims

As pointed out above in section VII.B.2.a. present independent claims 41, 53 and 65 recite, *inter alia*, that the claimed cosmetic or dermatological cleansing preparation comprises component (c), i.e., one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swellaable acrylate copolymers. As also explained in detail above, DUBOWOJ fails to disclose the use of any gel-forming cross-linked, alkali-swellaable copolymer in the shampoo concentrate compositions disclosed therein.

Appellants further point out again that regarding the compositions disclosed in DUBOWOJ, i.e., compositions which comprise a mixture of (a) at least one polyethyleneglycol-(3-10)-C<sub>8</sub>-C<sub>18</sub>- alkylcitrate sulfosuccinate and/or water-soluble salts thereof and (b) a C<sub>1</sub>-C<sub>4</sub> alkylacrylate/dimethyl- or diethylaminoethyl (meth)acrylate/C<sub>10</sub>-C<sub>30</sub> alkyl-polyethyleneglycol-10-30 itaconate terpolymer, DUBOWOJ states at page 2, lines 22-27 (emphasis added):

A further advantage of these compositions is the self-thickening effectiveness of these mixtures, i.e., it is not necessary to add additional inorganic or organic thickeners to achieve the viscosity range of about 1,000 to 60,000 mPa.s at 25°C, measured with a Brookfield viscosimeter, which is particularly preferred for shampoo concentrates.

The presence of such thickeners can cause stability problems because they can interfere with the other components. This is not the case with the shampoo concentrates based on the compositions according to the present invention.

The above passage is a clear warning to one of ordinary skill in the art that inorganic and organic thickeners may interfere with the other components of the composition disclosed therein. In other words, the above passage is a disincentive rather than a motivation for one of ordinary skill in the art to add any inorganic or organic thickeners such as the gel-forming acrylate thickeners selected from cross-linked, alkali-

swellable acrylate copolymers recited in the instant claims to the compositions of DUBOWOJ. Accordingly, DUBOWOJ not only fails to render obvious the instantly claimed preparations, but even teaches away therefrom. In view thereof, the Examiner clearly has failed to establish a *prima facie* case of obviousness of the subject matter of any of the instant independent claims (and the claims dependent therefrom) over DUBOWOJ.

**b. Dependent claims**

Appellants submit that even if one were to assume, *arguendo*, that DUBOWOJ renders obvious the subject matter of independent claims 41, 53 and 65 it is not seen that the subject matter of any of the following claims is rendered obvious by DUBOWOJ:

Claim 45 recites that the gel-forming cross-linked, alkali-swellable acrylate copolymer used as component (c) in the preparation of claim 41 comprises a copolymer of (i) one or more acrylate monomers, (ii) one or more  $\alpha,\beta$ -ethylenically unsaturated monomers and (iii) one or more polyunsaturated monomers suitable for partial cross-linking. It is not seen that DUBOWOJ suggests the use of any acrylate polymers which are different from the lower alkylacrylate/di(m)ethylaminoethyl (meth)acrylate/alkylpolyethylene glycol itaconate terpolymers disclosed therein, let alone the use of acrylate copolymers which are cross-linkable and are based, in part, on a polyunsaturated monomer, and neither does the Examiner offer any explanation in this regard.

Claim 50 recites that the preparation of claim 41 comprises from 0.1 % to 20 % by weight of one or more ethoxylated mono-, di-, and triglycerides of fatty acids having

an average degree of ethoxylation of from 3 to 20 ethylene oxide units. According to claim 51 the preparation comprises from 1 to 4 % by weight of these one or more ethoxylated mono-, di-, and triglycerides of fatty acids. It is not seen that DUBOWOJ teaches or suggests that the shampoo concentrates disclosed therein should contain ethoxylated mono-, di-, and triglycerides of fatty acids having an average degree of ethoxylation of from 3 to 20 ethylene oxide units, let alone in the percentages recited in claims 50 and 51. The Examiner has not provided any explanation in this regard, either.

Claim 59 recites that the preparation of claim 53 is free of cationic polymers. In this regard, it is noted that all of the five shampoo concentrates which are exemplified in DUBOWOJ contain at least one cationic polymer, i.e., Polyquaternium-7, wherefore DUBOWOJ clearly fails to suggest that the compositions disclosed therein should be free of cationic polymers.

Claim 63 recites that the preparation of claim 53 has at least one of a yield point of from 1 to 6 Pa and a  $\tan \delta$  of from 0.1 to 0.5. Appellants note that the Examiner has failed to explain why DUBOWOJ allegedly teaches that the compositions disclosed therein should have a yield point of from 1 to 6 Pa and/or a  $\tan \delta$  of from 0.1 to 0.5.

(Independent) claim 65 recites, *inter alia*, that the preparation has a yield point of from 0.5 to 20 Pa and a  $\tan \delta$  of from 0.05 to 0.6. The Examiner has failed to explain why DUBOWOJ allegedly suggests that the shampoo concentrates taught therein should have a yield point of from 0.5 to 20 Pa and a  $\tan \delta$  of from 0.05 to 0.6.

Claim 71 recites that the preparation of claim 65 is free of cationic polymers. Appellants point out again that all of the five shampoo concentrates which are exemplified in DUBOWOJ contain at least one cationic polymer, i.e., Polyquaternium-7,

wherefore DUBOWOJ clearly fails to suggest that the compositions disclosed therein should be free of cationic polymers.

### VIII. CONCLUSION

Appellants respectfully submit that for at least all of the foregoing reasons, the Examiner has failed to establish that claims 41-71 are anticipated by DUBOWOJ and also has failed to establish a *prima facie* case of obviousness of the subject matter of any of claims 41-71 over DUBOWOJ. The Board is, therefore, respectfully requested to reverse the Final Rejection, and to allow the application to issue in its present form.

Respectfully submitted,  
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/Heribert F. Muensterer/

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## CLAIMS APPENDIX

41. A cosmetic or dermatological cleansing preparation, wherein the preparation comprises

- (a) at least one disodium acyl glutamate as an anionic surfactant,
- (b) optionally, one or more further surfactants,
- (c) one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swelling acrylate copolymers,
- (d) optionally, up to 20 % by weight, based on a total weight of the preparation, of ethoxylated mono-, di-, and triglycerides of carboxylic acids having from 8 to 22 carbon atoms, and
- (e) optionally, suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets;

a total concentration of (a) plus (b) being from 10 % to 20 % by weight, relative to a total weight of the preparation.

42. The preparation of claim 41, wherein (a) comprises one or more of disodium lauroyl glutamate, disodium cocoyl glutamate, disodium myristoyl glutamate, disodium stearyl glutamate, and disodium tallowyl glutamate.

43. The preparation of claim 41, wherein (a) is present in a concentration of from 0.1 % to 5 % by weight, relative to a total weight of the preparation.

44. The preparation of claim 41, wherein (a) is present in a concentration of from 0.5 % to 4 % by weight.

45. The preparation of claim 41, wherein (c) comprises a copolymer of (i) one or more acrylate monomers, (ii) one or more  $\alpha,\beta$ -ethylenically unsaturated monomers and (iii) one or more polyunsaturated monomers suitable for partial cross-linking.

46. The preparation of claim 41, wherein (c) is present in a concentration of from 0.3 % to 6 % by weight, relative to a total weight of the preparation.

47. The preparation of claim 45, wherein (c) is present in a concentration of from 0.5 % to 4 % by weight, relative to a total weight of the preparation.

48. The preparation of claim 41, wherein (d) comprises one or more ethoxylated glycerin fatty acids.

49. The preparation of claim 48, wherein the one or more ethoxylated glycerin fatty acids are selected from PEG-10 olive oil glycerides, PEG-11 avocado oil glycerides, PEG-11 cocoa butter glycerides, PEG-13 sunflower oil glycerides, PEG-15 glyceryl isostearate, PEG-9 coconut fatty acid glycerides, PEG-54 hydrogenated castor oil, PEG-7 hydrogenated castor oil, PEG-60 hydrogenated castor oil, jojoba oil ethoxylate, PEG-26 jojoba fatty acids, PEG-26 jojoba alcohol, glycereth-5 cocoate, PEG-9 coconut fatty acid glycerides, PEG-7 glyceryl cocoate, PEG-45 palm kernel oil glycerides, PEG-35 castor

oil, olive oil PEG-7 ester, PEG-6 caprylic acid/capric acid triglycerides, PEG-10 olive oil glycerides, PEG-13 sunflower oil glycerides, PEG-7 hydrogenated castor oil, hydrogenated palm kernel oil glyceride-PEG-6 ester, PEG-20 corn oil glycerides, PEG-18 glyceryl oleate/cocoate, PEG-40 hydrogenated castor oil, PEG-40 castor oil, PEG-60 hydrogenated castor oil, PEG-60 corn oil glycerides, PEG-54 hydrogenated castor oil, PEG-45 palm kernel oil glycerides, PEG-35 castor oil, PEG-80 glyceryl cocoate, PEG-60 almond oil glycerides, PEG-60 evening primrose glycerides, PEG-200 hydrogenated glyceryl palmate, and PEG-90 glyceryl isostearate.

50. The preparation of claim 41, wherein the preparation comprises from 0.1 % to 20 % by weight of one or more ethoxylated mono-, di-, and triglycerides of fatty acids having an average degree of ethoxylation of from 3 to 20 ethylene oxide units.

51. The preparation of claim 41, wherein the preparation comprises from 1 % to 4 % by weight of the one or more ethoxylated mono-, di-, and triglycerides.

52. The preparation of claim 41, wherein the preparation comprises at least 12 % by weight of (a) plus (b).

53. A cosmetic or dermatological cleansing preparation, wherein the preparation comprises

(a) at least one anionic surfactant,

(b) optionally, one or more further surfactants,



(c) one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swellaable acrylate copolymers,

(d) from 1 % to 20 % by weight, based on a total weight of the preparation, of ethoxylated mono-, di-, and triglycerides of carboxylic acids having from 8 to 22 carbon atoms, and

(e) optionally, suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets;

a total concentration of (a) plus (b) being from 10 % to 20 % by weight, relative to a total weight of the preparation.

54. The preparation of claim 53, wherein (a) and (b) comprise one or more surfactants selected from disodium acyl glutamates, lauryl ether sulfates, alkyl amidopropylbetaines and alkyl polyglucosides.

55. The preparation of claim 54, wherein (c) is present in a concentration of from 0.5 % to 4 % by weight, relative to a total weight of the preparation.

56. (new) The preparation of claim 53, wherein the preparation comprises a gel.

57. The preparation of claim 56, wherein at least one of gaseous, solid, and liquid objects are embedded in the gel.

58. The preparation of claim 53, wherein the preparation comprises not more than 0.5 % by weight of cationic polymers.

59. The preparation of claim 53, wherein the preparation is free of cationic polymers.

60. The preparation of claim 53, wherein (a) comprises from 0.5 % to 5 % by weight of one or more of disodium lauroyl glutamate, disodium cocoyl glutamate, disodium myristoyl glutamate, disodium stearyl glutamate, and disodium tallowyl glutamate.

61. The preparation of claim 60, wherein the preparation comprises at least 12 % by weight of (a) plus (b).

62. The preparation of claim 53, wherein the preparation has a transmission value of >70 %.

63. The preparation of claim 53, wherein the preparation has at least one of a yield point of from 1 to 6 Pa and a  $\tan \delta$  of from 0.1 to 0.5.

64. The preparation of claim 53, wherein the preparation has a pH of from 6.3 to 6.9.

65. A cosmetic or dermatological cleansing preparation, wherein the preparation comprises

(a) at least one anionic surfactant,

(b) optionally, one or more further surfactants,

(c) one or more gel-forming acrylate thickeners selected from cross-linked, alkali-swelling acrylate copolymers,

(d) optionally, up to 20 % by weight, based on a total weight of the preparation, of ethoxylated mono-, di-, and triglycerides of carboxylic acids having from 8 to 22 carbon atoms, and

(e) optionally, suspended objects selected from one or more of solid particles, gas bubbles and liquid droplets;

and wherein (a) and (b) comprise one or more surfactants selected from disodium acyl glutamates, lauryl ether sulfates, alkyl amidopropylbetaines and alkyl polyglucosides, a total concentration of (a) plus (b) is from 10 % to 20 % by weight, relative to a total weight of the preparation, and the preparation has a yield point of from 0.5 to 20 Pa, a  $\tan \delta$  of from 0.05 to 0.6, and a pH of  $>5.5$ .

66. The preparation of claim 65, wherein the preparation has a transmission value of  $>70$  %.

67. The preparation of claim 66, wherein the preparation has at least one of a yield point of from 1 to 6 Pa, a  $\tan \delta$  of from 0.1 to 0.5, and a pH of  $>6.0$ .

68. The preparation of claim 65, wherein (a) comprises from 0.5 % to 5 % by weight of one or more of disodium lauroyl glutamate, disodium cocoyl glutamate, disodium myristoyl glutamate, disodium stearoyl glutamate, and disodium tallowyl glutamate.

69. The preparation of claim 68, wherein the preparation comprises at from 12 % to 16 % % by weight of (a) plus (b).

70. The preparation of claim 65, wherein (e) is present.

71. The preparation of claim 65, wherein the preparation is free of cationic polymers.

## **EVIDENCE APPENDIX**

None.

**RELATED PROCEEDINGS APPENDIX**

None.